

AMENDED IN ASSEMBLY JUNE 14, 2004

AMENDED IN SENATE MAY 11, 2004

AMENDED IN SENATE APRIL 22, 2004

SENATE BILL

No. 1436

Introduced by Senator Murray

(Coauthors: Senators Bowen and Romero)

(Coauthors: Assembly Members Chavez, *Shirley Horton*, *Koretz*,
Jackson, and Nation)

February 19, 2004

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as amended, Murray. Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No existing law provides for the regulation of computer spyware.

This bill would make it unlawful for a person or entity ~~that is not the other than the authorized~~ user of a computer ~~located~~ *owned by a person* in California to ~~knowingly install~~ *cause the installation of* spyware, as defined, on, or provide computer software containing spyware to, the ~~that~~ computer unless the person ~~has provided~~ *provides* a notice meeting specified requirements. ~~The bill would prohibit electronic mail sent from California or to a California e-mail address from containing an HTML link to spyware that automatically downloads and would prohibit a Web page from automatically downloading spyware onto a user's computer located in California, unless notice is provided prior to the download. The bill would also prohibit a person or entity from~~

~~advertising in spyware distributed or installed in violation of the prohibition.~~ The bill would, with specified exceptions, authorize the ~~recipient of spyware transmitted in violation of these prohibitions~~ *authorized user of a computer* or the Internet service provider to bring an action to recover actual damages ~~for a violation of this requirement,~~ and would authorize these parties to recover liquidated damages of \$1,000 per ~~transmission violation,~~ subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff.

This bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Chapter 32 (commencing with Section 22947)~~
 2 *SECTION 1. Chapter 32 (commencing with Section 22947) is*
 3 *added to Division 8 of the Business and Professions Code, to read:*

4
 5 *CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER*
 6 *SPYWARE ACT*
 7

8 *22947. This chapter shall be known as and may be cited as the*
 9 *Consumer Protection Against Computer Spyware Act.*

10 *22947.1. For purposes of this chapter, the following terms*
 11 *have the following meanings:*

12 *(a) "Authorized user," with respect to a computer, means a*
 13 *person who owns or is an authorized user of such computer. For*
 14 *purposes of this chapter, in the case of an employer/employee*
 15 *relationship, the employer of record is the authorized user.*

16 *(b) "Cause the installation" means to select and place online*
 17 *at an online location available to the public, or directly to cause*
 18 *placement on a computer of computer software, or any executable*
 19 *component thereof, via the Internet or any other medium,*
 20 *including local area networks of computers, other nonwire*
 21 *transmissions, and disc or other data storage devices. This does*
 22 *not include an executable that is in compliance with this chapter*

1 *if another, unrelated executable attaches to, through, or via*
2 *another unrelated executable that did not cause its installation.*

3 (c) *“Computer software” means a sequence of instructions*
4 *written in any programming language that is executed on a*
5 *computer.*

6 (d) *“Execute,” “execution,” and “executable,” when used*
7 *with respect to computer software, refers to the performance of the*
8 *functions or the carrying out of the instructions of the computer*
9 *software.*

10 (e) *“First retail sale” means the sale of a computer, for a*
11 *purpose other than resale, after the manufacture, production, or*
12 *importation of the computer. For purposes of this chapter, the lease*
13 *of a computer shall be considered a retail sale of the computer.*

14 (f) *“Internet” means the global information system that is*
15 *logically linked together by a globally unique address space based*
16 *on the Internet Protocol (IP), or its subsequent extensions, and that*
17 *is able to support communications using the Transmission Control*
18 *Protocol/Internet Protocol (TCP/IP) suite, or its subsequent*
19 *extensions, or other IP-compatible protocols, and that provides,*
20 *uses, or makes accessible, either publicly or privately, high level*
21 *services layered on the communications and related infrastructure*
22 *described in this subdivision.*

23 (g) *“Internet service provider” means an entity offering*
24 *transmission, routing, or access to the Internet.*

25 (h) *“Person” means any individual, partnership, corporation,*
26 *limited liability company, or other organization, or any*
27 *combination thereof.*

28 (i) *“Personal information” means any of the following with*
29 *regard to an authorized user:*

30 (1) *First name or first initial in combination with last name.*

31 (2) *Credit or debit card numbers.*

32 (3) *A password or personal identification number required to*
33 *access a financial account.*

34 (4) *Account balances.*

35 (5) *Overdraft history.*

36 (6) *Individually identifiable payment history.*

37 (7) *Personally identifiable history of Web sites visited.*

38 (8) *Social security number.*

39 (9) *Home address.*

40 (10) *Work address.*

1 (11) *A record of a purchase or purchases.*

2 (j) *“Spyware” means a software program that self-executes on*
3 *an authorized user’s computer and that is used without notice as*
4 *described in Section 22947.2 to do any of the following:*

5 (1) *Collect and transmit personal information from an*
6 *authorized user of the computer for a purpose wholly unrelated to*
7 *the purpose of the software as described to an authorized user of*
8 *the computer.*

9 (2) *Use the authorized user’s computer as part of an activity*
10 *performed by a group of computers that causes damage to another*
11 *computer, such as launching a denial of service attack.*

12 (3) *Deliver a pop-up on an authorized user’s computer that a*
13 *reasonable computer user cannot close without turning off the*
14 *computer or closing the user’s Internet browser software.*

15 (4) *Change the default home page of the computer user without*
16 *the consent of the authorized user.*

17 (5) *Alter the Internet service provider of the person without the*
18 *authorization of an authorized user.*

19 (6) *Use an authorized user’s computer in a manner that causes*
20 *the person to incur monetary charges that the authorized user has*
21 *not authorized.*

22 (7) *Transmit or relay commercial electronic mail initiated by a*
23 *person other than the authorized user without the authorization of*
24 *the authorized user.*

25 (k) *“Web page” means a location that has a single Uniform*
26 *Resource Locator with respect to the World Wide Web or other*
27 *single location with respect to the Internet.*

28 22947.2. (a) *It is unlawful for any person, other than an*
29 *authorized user, to surreptitiously cause the installation of spyware*
30 *on a computer owned by a person in California, or on a computer*
31 *prior to the first retail sale of that computer, if that computer*
32 *software, or any executable component thereof is spyware, unless*
33 *a notice meeting the requirements of subdivision (b) is provided by*
34 *that person or by another person to the authorized user of the*
35 *computer.*

36 (b) (1) *The notice required under subdivision (a) shall meet all*
37 *of the following requirements:*

38 (A) *Be displayed clearly to the authorized user once, at the time*
39 *the software is installed, or, in the case of pre-installed software or*
40 *for software that is not activated upon installation, before the first*



1 *time the software executes one of the functions described in*
2 *subdivision (j) of Section 22947.1.*

3 *(B) State briefly that types of personal information, as*
4 *described in subdivision (i) of Section 22947.1, the software*
5 *collects and transmits.*

6 *(2) A notice is “displayed clearly” within the meaning of this*
7 *subdivision if it is displayed separately from an electronic uniform*
8 *license agreement and is both of the following:*

9 *(A) Written in larger type than the surrounding text, or in*
10 *contrasting type, font, or color to the surrounding text of the same*
11 *size, or set off from the surrounding text of the same size by symbols*
12 *or other marks that call attention to the language.*

13 *(B) Displayed so that a reasonable person would notice it.*

14 *(3) A single notice that applies to more than one software*
15 *program satisfies the requirements of this section if the software*
16 *programs are provided to the authorized user together as part of*
17 *a group of software programs.*

18 *22947.3. (a) (1) In addition to any other remedies provided*
19 *by this chapter or any other provision of law, an authorized user*
20 *who has spyware installed or receives computer software*
21 *containing spyware in violation of Section 22947.2 or the Internet*
22 *service provider may bring an action against the person or entity*
23 *that violated Section 22947.2 to recover either or both of the*
24 *following:*

25 *(A) Actual damages.*

26 *(B) Liquidated damages of one thousand dollars (\$1,000) for*
27 *each instance of spyware installed, or computer software*
28 *containing spyware provided, in violation of Section 22947.2.*

29 *(2) The authorized user or the Internet service provider, if the*
30 *prevailing plaintiff, may also recover reasonable attorney’s fees*
31 *and costs.*

32 *(b) If the court finds that a defendant established and*
33 *implemented, with due care, practices and procedures reasonably*
34 *designed to effectively provide the notice required by Section*
35 *22947.2, the court shall reduce the liquidated damages*
36 *recoverable under subdivision (a) to a maximum of one hundred*
37 *dollars (\$100) for each instance of spyware installed, or computer*
38 *software containing spyware provided, in violation of this chapter.*

39 *(c) There shall not be a cause of action under this section*
40 *against an Internet service provider that is only involved in the*

1 routine transmission over its computer network of the computer
2 software containing spyware.

3 22947.4. It is the intent of the Legislature that this chapter is
4 a matter of statewide concern. This chapter supersedes and
5 preempts all rules, regulations, codes, ordinances, and other laws
6 adopted by a city, county, city and county, municipality, or local
7 agency regarding spyware and notices to consumers from
8 computer software providers regarding information collection.

9 22947.5. The provisions of this chapter are severable. If any
10 provision of this chapter or its application is held invalid, that
11 invalidity shall not affect any other provision or application that
12 can be given effect without the invalid provision or application.
13 ~~is added to Division 8 of the Business and Professions Code, to~~
14 ~~read:~~

15

16 ~~CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER~~
17 ~~SPYWARE ACT~~

18

19 22947. — This chapter shall be known as and may be cited as the
20 Consumer Protection Against Computer Spyware Act.

21 22947.1. — For purposes of this chapter, the following terms
22 have the following meanings:

23 (a) “Cookie” means a text file that is placed on a computer by
24 an Internet service provider, interactive computer service, or
25 Internet Web site, and that has the sole function of recording
26 information that can be read or recognized by an Internet service
27 provider, interactive computer service, or Internet Web site when
28 the user of the computer uses or accesses the Internet service
29 provider, interactive computer service, or Internet Web site. A
30 cookie does not track or report to a third party the Web sites that
31 a user visits.

32 (b) “Install” means either of the following actions:

33 (1) Writing computer software to a computer’s persistent
34 storage medium, such as the computer’s hard disk, in such a way
35 that the computer software is retained on the computer after the
36 computer is turned off and subsequently restarted.

37 (2) Writing computer software to a computer’s temporary
38 memory, such as random access memory, in such a way that the
39 software is retained and continues to operate after the user of the
40 computer turns off or exits the Internet service, interactive



1 ~~computer service, or Internet Web site from which the computer~~
2 ~~software was obtained.~~

3 ~~(c) “Personal information” means any of the following:~~

4 ~~(1) Name.~~

5 ~~(2) Credit card numbers.~~

6 ~~(3) Passwords.~~

7 ~~(4) Account balances.~~

8 ~~(5) Overdraft history.~~

9 ~~(6) Credit or debit card information.~~

10 ~~(7) Payment history.~~

11 ~~(8) An individually identifiable history of Web sites visited.~~

12 ~~(9) A social security number.~~

13 ~~(10) A personal identification number (PIN).~~

14 ~~(11) A telephone number.~~

15 ~~(12) An electronic mail address.~~

16 ~~(13) An online user name.~~

17 ~~(14) A home address.~~

18 ~~(15) A work address.~~

19 ~~(16) A record of a purchase or purchases.~~

20 ~~(17) An electronic mail, whether sent or received.~~

21 ~~(d) “Spyware” means an executable computer software~~
22 ~~program that is installed on a user’s computer without the~~
23 ~~knowledge of a computer user by a computer software~~
24 ~~manufacturer, computer software controller, or Web site operator,~~
25 ~~and that does either of the following:~~

26 ~~(1) Gathers and transmits to the provider of the computer~~
27 ~~software, to a third party, or to a remote computer or server any of~~
28 ~~the following types of information:~~

29 ~~(A) The personal information of a user.~~

30 ~~(B) Data regarding computer usage, including, but not limited~~
31 ~~to, which Internet sites are or have been visited by a user.~~

32 ~~(2) Operates in a manner that is intended to confuse or mislead~~
33 ~~the user concerning the identity of the person or entity responsible~~
34 ~~for the performed functions or content displayed by the computer~~
35 ~~software.~~

36 ~~(e) “User” means either of the following:~~

37 ~~(1) A computer owner.~~

38 ~~(2) An individual who operates a computer with the~~
39 ~~authorization of the computer’s lawful owner.~~

1 ~~22947.2.—(a) It is unlawful for a person or entity that is not the~~
2 ~~user of a computer to knowingly install spyware on, or provide~~
3 ~~computer software containing spyware to the user of, a computer~~
4 ~~located in California unless the notice requirements of this section~~
5 ~~are complied with.~~

6 ~~(b) A person or entity that provides computer software~~
7 ~~containing spyware to a user's computer in California, or causes~~
8 ~~spyware to be placed on, or downloaded onto, a user's computer~~
9 ~~located in California shall disclose, in a clear notice of at least~~
10 ~~18-point font, all of the following information to the user who is~~
11 ~~the recipient of the spyware:~~

12 ~~(1) That the computer software contains spyware.~~

13 ~~(2) What the functions of the spyware are.~~

14 ~~(3) What specific personal information the spyware collects.~~

15 ~~(4) How the personal information is collected.~~

16 ~~(5) To whom any collected personal information is sent.~~

17 ~~(6) What types of advertisements the spyware will cause the~~
18 ~~user to view.~~

19 ~~(7) A valid electronic mail address or toll-free telephone~~
20 ~~number for the person or entity.~~

21 ~~(8) The purpose for which the collected personal information~~
22 ~~will be used.~~

23 ~~(9) A clear description of procedures the user may follow to~~
24 ~~uninstall the computer software.~~

25 ~~(c) The notice required by this section shall be displayed to the~~
26 ~~user prior to the occurrence of any of the following:~~

27 ~~(1) The computer software's opening download.~~

28 ~~(2) A Web site placing the spyware on a user's computer.~~

29 ~~(3) The computer software's installation.~~

30 ~~(d) Placing the required notice in a license agreement does not~~
31 ~~satisfy the requirements of this section.~~

32 ~~(e) Electronic mail sent from California or to a California~~
33 ~~e-mail address may not contain an HTML link to spyware that~~
34 ~~automatically downloads onto a user's computer when a viewer~~
35 ~~opens the e-mail or the link, unless a notice meeting the~~
36 ~~requirements of this section is provided prior to the download.~~

37 ~~(f) A Web page may not automatically, upon opening the page,~~
38 ~~download spyware onto a user's computer located in California~~
39 ~~unless a notice meeting the requirements of this section has been~~
40 ~~provided prior to the download.~~

~~(g) A person or entity may not advertise in spyware distributed in violation of this section.~~

~~22947.3.— (a) Notwithstanding any other provisions of this chapter, the following do not constitute spyware and are not subject to the requirements of this chapter:~~

~~(1) Paid advertisements and pop-ups that are part of a Web site as long as these paid advertisements do not place files or data on a user's hard disk drive without proper notice.~~

~~(2) Computer software or data that reports to an Internet Web site only information previously stored by that Internet Web site on the user's computer. This includes, but is not limited to, the following:~~

~~(A) Cookies.~~

~~(B) HTML code.~~

~~(C) Java-like scripts.~~

~~(b) For purposes of this chapter, a person shall not be deemed to have installed spyware on a computer solely because that person did either of the following:~~

~~(1) Provided the Internet connection or other transmission capability through which the computer software was delivered to the computer for installation.~~

~~(2) Provided the storage or hosting, at the direction of another person and without selecting the content to be stored or hosted, of the computer software or of an Internet Web site through which the computer software was made available for installation.~~

~~22947.4.— (a) (1) In addition to any other remedies provided by this chapter or any other provision of law, a person who has spyware installed or receives computer software containing spyware in violation of Section 22947.2 or the Internet service provider may bring an action against the person or entity that violated Section 22947.2 to recover either or both of the following:~~

~~(A) Actual damages.~~

~~(B) Liquidated damages of one thousand dollars (\$1,000) for each instance of spyware installed, or computer software containing spyware provided, in violation of Section 22947.2.~~

~~(2) The recipient or the Internet service provider, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.~~

~~(b) If the court finds that a defendant established and implemented, with due care, practices and procedures reasonably~~

1 ~~designed to effectively provide the notice required by Section~~
2 ~~22947.2, the court shall reduce the liquidated damages recoverable~~
3 ~~under subdivision (a) to a maximum of one hundred dollars (\$100)~~
4 ~~for each instance of spyware installed, or computer software~~
5 ~~containing spyware provided, in violation of this chapter.~~

6 ~~(c) There shall not be a cause of action under this section~~
7 ~~against an Internet service provider that is only involved in the~~
8 ~~routine transmission over its computer network of the computer~~
9 ~~software containing spyware.~~

10 ~~22947.9. The provisions of this chapter are severable. If any~~
11 ~~provision of this chapter or its application is held invalid, that~~
12 ~~invalidity shall not affect any other provision or application that~~
13 ~~can be given effect without the invalid provision or application.~~

